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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/916,549	07/27/2001	Cherisse Morgan	3052M	8575

7590 01/12/2005

S. Michael Bender  
P.O. Box 530399  
St. Petersburg, FL 33747

EXAMINER
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EDELL, JOSEPH F

ART UNIT	PAPER NUMBER
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3636

DATE MAILED: 01/12/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

09/916,549

Applicant(s)

MORGAN ET AL.

Examiner

Joseph F Edell

Art Unit

3636

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 19 October 2004.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,3,4 and 6-14 is/are pending in the application.
- 4a) Of the above claim(s) 12-14 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,3,4 and 6-11 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 27 July 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### *Claim Objections*

1. Claim 1 is objected to because of the following informalities:
  - a. line 22, "at least pair" should read --at least said pair--;
  - b. line 23, "at least pair" should read --at least said pair--;
  - c. lines 24-25, "at least pair" should read --at least said pair--;
  - d. lines 25-26, "at least pair" should read --at least said pair--;
  - e. line 27, "at least pair" should read --at least said pair--.Appropriate correction is required.

### *Claim Rejections - 35 USC § 103*

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 1 and 9 are rejected under 35 U.S.C. 103(a) as being anticipated by U.S. Patent No. 3,112,956 to Schick et al. in view of U.S. Patent No. 4,694,511 to Estes et al.

Schick et al. disclose a cushion apparatus that is basically the same as that recited in claims 1 and 9 except that the apparatus lacks second cushion attachment straps that attach to each other under a lounge chair, as recited in the claims. Figures 1-6 of Schick et al. show a cushion apparatus having an upper body cushion 21 (Fig. 2)

Art Unit: 3636

with a neck-cushion-reception channel 24a (Fig. 5) and at least a pair of first upper cushion attachment straps 30 (Fig. 2), a flexible hinge 22 (Fig. 2), and a lower body cushion 20 (Fig. 1) with at least a pair of first lower cushion attachment straps (see column 3, lines 20-21). Estes et al. show a cushion apparatus similar to that of Schick et al. wherein apparatus has a stretch fabric 10 (Fig. 1) including an upper body portion 17 (Fig. 6), upper attachment straps 18 (Fig. 6), a lower body portion 16 (Fig. 6), and lower attachment straps 19 (Fig. 6) wherein the upper and lower attachment straps are adapted to affix the upper body portion and lower body portion to a lounge chair (Fig. 6) by being employed in pairs attachable to each other underneath the rails of the lounge chair. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the cushion apparatus of Schick et al. such that the upper and lower body cushion portions have at least a pair of second upper and lower attachment straps adapted to affix the upper and lower body cushion portions by being employed in pairs attachable to each other underneath the rails of the lounge chair, such as the cushion apparatus disclosed in Estes et al. One would have been motivated to make such a modification in view of the suggestion in Estes et al. that the attachment straps allow the apparatus to be additionally attached to a vehicle seat to prevent unwanted wetting of the vehicle seat as well as to attach to a user's body to provide added apparel to lightly clad users.

4. Claims 3, 4, 10, and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schick et al. in view Estes et al. as applied to claims 1 and 9, as best understood above, and further in view of U.S. Patent No. 6,068,342 to Mariani et al.

Art Unit: 3636

Schick et al., as modified, disclose a cushion apparatus that includes all the limitations recited in claims 3, 4, 10, and 11 except the neck-cushion-reception channel lacks a neck cushion and a recliner chair frame assembly with an auxiliary frame member, as recited in the claims. Mariani et al. show a cushion apparatus similar to that of Schick et al. wherein the upper body cushion 100 (Fig. 1) has a neck-cushion-reception channel 120 (Fig. 1) with a neck cushion 202 (Fig. 2) having a bottom cushion portion and a top cushion portion, as well as a recliner chair frame assembly having legs 408 (Fig. 4), a lower frame member 504 (Fig. 5) with connection straps 508 (Fig. 5), frame orientation assemblies 510 (Fig. 5), an upper frame member 502 (Fig. 5) with connection straps 506 (Fig. 5), and an auxiliary frame member 136 (Fig. 2) with a beverage holder (see column 4, lines 26-28). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to further modify the cushion apparatus of Schick et al. such that the neck-cushion-reception channel has a neck cushion with top and bottom cushions as well as have a recliner chair frame assembly having lower and upper frame members with connection straps, frame orientation assemblies, and an auxiliary frame member with a beverage holder, such as the cushion apparatus disclosed in Mariani et al. One would have been motivated to make such a modification in view of the suggestion in Mariani et al. that the neck cushion provides head support.

5. Claims 6-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schick et al. in view Estes et al. as applied to claims 1 and 9, as best understood above, and further in view of U.S. Patent No. 5,237,713 to Prager.

Schick et al., as modified, disclose a cushion apparatus that includes all the limitations recited in claims 6-8 except the cushion lacks a cylindrical lumbar cushion attached via hook-or-loop connectors, as recited in the claims. Prager shows a cushion apparatus similar to that of Schick et al. wherein the cushion apparatus has a cylindrical lumbar cushion 42 (Fig. 1) attached by hook-or-loop connectors 64,66 (Fig. 1). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to further modify the cushion apparatus of Schick et al. such that the apparatus has a cylindrical lumbar cushion attached by hook-or-loop connectors and a recliner chair assembly. One would have been motivated to make such a modification in view of the suggestion in Prager that the adjustable lumbar cushion on the chair allows for lower back support for any user.

### ***Response to Arguments***

6. Applicant's arguments filed 19 October 2004 have been fully considered but they are not persuasive. In response to applicant's argument that straps of Schick et al. are not specified as adapted to affix the cushion portions directly to rail members of a lounge chair, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). Also, Applicant remarks that individually neither Schick et al. nor Estes et al. show or suggest

Art Unit: 3636

the unique apparatus of claim 1. However, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). In response to the 35 USC(a) rejection of claim 1 as being unpatentable over Schick et al. in view of Estes et al., Applicant argues that one of ordinary skilled in the art would have been motivated to substitute a single pair of straps of Estes et al. for the single pair of straps of Schick et al. and that Examiner employs hindsight reasoning. However, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). In this instance, one of ordinary skill in the art would have been motivated to *add* the pairs of upper and lower attachments straps of Estes et al. to the cushion apparatus of Schick et al. in view of the suggestion in Estes et al. that the pairs of upper and lower attachment straps provide straps with sufficient length to wrap around both lounge chairs and motor vehicle seats. The additional attachment straps provide a cushion apparatus that may prevent unwanted wetting of motor vehicle seats as well as to attach to a user's body to provide added apparel to lightly clad users. The upper and lower attachment straps shown in Schick et al. interconnect to the sides of a lounge chair and are not intended to wrap around the chair or function as apparel attachment

Art Unit: 3636

straps. The combination of the teachings of Schick et al. in view of Estes et al. provide a cushion apparatus with pairs of first upper and lower attachment straps interconnecting to the sides of a lounge chair as well as pairs of second upper and lower attachment straps wrapping around and affixing the cushion apparatus to a lounge chair or a motor vehicle seat and potentially attaching to a user's body thereby providing added apparel.

### ***Conclusion***

7. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).


A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.




Art Unit: 3636

8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Joseph F. Edell whose telephone number is (703) 605-1216. The examiner can normally be reached on Mon.-Fri. 8:30am-5:00pm.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
JE  
January 5, 2005

  
Peter M. Cuomo  
Supervisory Patent Examiner  
Technology Center 3600